

2015 DEC -7 PM 2:41

CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY NP DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE JUDITH JEAN HOFFMAN,

Debtor.

JUDITH JEAN HOFFMAN,

Appellant,

v.

LESLIE T. GLADSTONE, Trustee;
ROBERT HOFFMAN; HOFFMAN
PROPERTIES,

Appellees.

Case No.: 15-CV-2581-BEN (KSC)

Bankruptcy No. 13-05478-MM7
Adversary No. 14-90098-MM

ORDER:

**(1) GRANTING APPELLANT'S
MOTION TO PROCEED IN FORMA
PAUPERIS**

(2) DISMISSING APPEAL

This case comes before the Court on appeal from the Bankruptcy Court for the Southern District of California.

On November 17, 2015, Appellant Judith Jean Hoffman filed a Notice of Appeal, seeking review of a November 3, 2015 "Ex Parte Motion to Extend Date of Transmission of Record on Appeal," filed by Trustee Leslie T. Gladstone. (Docket No. 1.) She also filed a Motion to Proceed *In Forma Pauperis* ("IFP"). (Docket No. 2.) For the reasons stated below, Appellant's Motion to Proceed IFP is **GRANTED**, and the Appeal is **DISMISSED**.

1 **I. Appellant's Motion to Proceed IFP**

2 All parties instituting any civil action, suit, or proceeding in a district court of the
 3 United States, except an application for a writ of habeas corpus, must pay a filing fee. 28
 4 U.S.C. § 1914(a). An action may proceed despite a party's failure to prepay the entire fee
 5 only if she is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). Under 28
 6 U.S.C. § 1915(a)(1),

7 [A]ny court of the United States may authorize the commencement,
 8 prosecution or defense of any suit, action or proceeding, civil or criminal, or
 9 appeal therein, without prepayment of fees or security therefor, by a person
 10 who submits an affidavit that includes a statement of all assets such [person]
 possesses that the person is unable to pay such fees or give security therefor.

11 It appears Appellant receives \$1696 per month in social security benefits. (Mot.
 12 3.) She is not employed and has only \$11.50 in cash and checking accounts. (*Id.*)
 13 Appellant's total monthly expenses amount to approximately \$1655. (*Id.* at 5.) Although
 14 Appellant claims to own a home and a partnership interest in real estate, her home is in
 15 foreclosure and the partnership's real property is controlled by the ongoing bankruptcy
 16 proceedings. (*Id.* at 3.) Accordingly, Appellant has sufficiently shown that she cannot
 17 afford to pay the filing fees. Her Motion to Proceed IFP is therefore **GRANTED**.

18 **II. IFP Screening**

19 Under section 1915(e) of title 28 of the United States Code, the Court must *sua
 20 sponte* dismiss IFP cases which are frivolous, malicious, fail to state a claim, or which
 21 seek damages from defendants who are immune. *See Calhoun v. Stahl*, 254 F.3d 845,
 22 845 (9th Cir. 2001) ("[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to
 23 prisoners.").

24 Pursuant to 28 U.S.C. § 158(a), district courts have jurisdiction to hear appeals
 25 from "final judgments, orders, and decrees;" "interlocutory orders and decrees issued
 26 under section 1121(d) of title 11;" and "with leave of the court, from other interlocutory
 27 orders and decrees." A properly filed appeal with leave of court must include a timely
 28 notice of appeal and a motion for leave to appeal, which states "the facts necessary to

1 understand the question presented; the question itself; the relief sought; the reasons why
 2 leave to appeal should be granted; and a copy of the interlocutory order or decree and any
 3 related opinion or memorandum.” Fed. R. Bankr. P. 8004.

4 Based upon the Notice of Appeal, it appears Appellant is attempting to appeal from
 5 the Trustee’s Motion. A motion is not a final order, decree, or judgment that this Court
 6 has jurisdiction to hear. *See* 28 U.S.C. § 158. Accordingly, the notice of appeal is
 7 frivolous and fails to state a claim.

8 If Appellant seeks to appeal from the *order* on the Trustee’s motion, this Court
 9 declines to hear the matter pursuant to section 158(a)(3) and Rule 8004(d).

10 A final judgment, order or decree is “one which ends the litigation on the merits
 11 and leaves nothing for the court to do but execute the judgment.” *Catlin v. United States*,
 12 324 U.S. 229, 233 (1945). Under the Ninth Circuit’s “pragmatic approach,” an order is
 13 final and appealable “where it (1) resolves and seriously affects substantive rights and (2)
 14 finally determines the discrete issue to which it is addressed.” *In re Bonham*, 229 F.3d
 15 750, 761 (9th Cir. 2000) (quoting *In re Lewis*, 113 F.3d 1040, 1043 (9th Cir. 1997)).

16 The order at issue here relates to the “transmission of record on appeal”—it has
 17 nothing to do with the merits of Appellant’s bankruptcy petition. As a result, the order is
 18 interlocutory. Further, the order was not issued under 11 U.S.C. § 1121(d). Thus, the
 19 Court has discretionary jurisdiction to hear the appeal pursuant to section 158(a)(3).

20 Where the appellant fails to file the requisite motion for leave to appeal, Rule
 21 8004(d) provides that the district court may “treat the notice of appeal as a motion for
 22 leave and either grant or deny it.” “In deciding whether to grant leave to appeal an
 23 interlocutory order under section 158(a)(3), courts look to the analogous provisions of 28
 24 U.S.C. § 1292(b), which governs review by courts of appeals of interlocutory district
 25 court orders.” *Hogan Lovells US LLP v. Howrey LLP*, 2014 WL 6602687, at *2 (N.D.
 26 Cal. Nov. 20, 2014) (citations omitted). Under section 1292(b), such an appeal is
 27 appropriate if the order “involves a controlling question of law as to which there is
 28 substantial ground for difference of opinion and an immediate appeal from the order may

1 materially advance the ultimate termination of the litigation.”

2 Appellant did not file a motion for leave to appeal. In any event, the Court
 3 construes the notice of appeal as a motion for leave and denies the motion. In order to
 4 evaluate the motion for leave, the Court takes judicial notice of the Bankruptcy Court’s
 5 November 2, 2015 “Order on Leslie T. Gladstone, Chapter 7 Trustee’s Ex Parte Motion
 6 to Extend the Date of Transmission of the Record on Appeal,” in Adversary Case No. 14-
 7 90098, Docket No. 144. *See* Fed. R. Evid. 201(c)(1).

8 The order dealt with the record on appeal required in *In re Judith Jean Hoffman*,
 9 No. 15-cv-2092, which was also before this Court. The Bankruptcy Court extended the
 10 date for the transmission of the record on appeal to November 24, 2015 because “it [was]
 11 almost certain” that the appeal would be dismissed and the expense of transmission
 12 would be unnecessary.

13 Whether to extend the time to transmit a record on appeal does not involve a
 14 controlling question of law. There is not substantial grounds for difference of opinion
 15 over when to transmit a record. Nor would the instant appeal “materially advance the
 16 ultimate termination” of the Adversary Case.

17 On November 20, 2015, the appeal No. 15-cv-2092 was dismissed. Thus, the
 18 Bankruptcy Court was correct in its prediction that the transmission would be
 19 unnecessary. Accordingly, a decision on the instant appeal would have no effect. The
 20 Court therefore exercises its discretion and denies Appellant’s motion for leave to appeal.

21 CONCLUSION

22 Appellant’s Motion to Proceed IFP is **GRANTED**. The appeal is **DISMISSED**
 23 pursuant to Federal Rule of Bankruptcy 8004(d). The Clerk may close the case.

24 IT IS SO ORDERED.

25
 26 DATED: December 7, 2015


 27 HON. ROGER T. BENITEZ
 28 United States District Judge